Supreme Court, U.S.
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No. 95-1956

In the
Supreme Court of the United States
October Term, 1994

UNITED STATES DEPARTMENT
OF THE INTERIOR, ET AL.,

Petitioners,

vs.

STATE OF SOUTH DAKOTA
AND CITY OF OACOMA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE MINNESOTA CHIPPEWA TRIBE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The Minnesota Chippewa Tribe (the "MCT") is a federally recognized tribe of Indians[1] that is organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476. It operates under a Constitution and Bylaws originally approved by the Secretary of the Interior in 1936 and re-approved as revised on March 3, 1964. The Tribe serves as the umbrella organization for six bands of Minnesota Chippewas: Bois Forte (Nett Lake), Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth. Since the passage of the Indian Reorganization Act in 1934 (the "IRA")[2], substantial amounts of land have been acquired by the United States pursuant to Section 5 of the IRA (25 U.S.C. 465) either in trust for the Tribe itself or for its individual constituent bands. Currently, action is pending before the Secretary of the U.S. Department of the Interior on requests to take over 120 parcels of land into trust for the various Bands of the Tribe. The decision of the Court of Appeals in this case directly affects these and all future transfers into trust by the Tribe and its six Bands.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit has found one of the core statutes of federal Indian law to be unconstitutional by adopting an extraordinarily strict formulation of the so-called "non-delegation doctrine". Whether Section 5 of the IRA is an unconstitutional delegation of legislative authority is a fundamental and crucially important question of both constitutional law and federal Indian law.

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[1] *See* 48 Fed. Reg. 56854 (1983).

[2] 25 U.S.C. 461 *et seq.*

The significance of Section 5 of the IRA to Federal Indian Law is best illustrated by considering its importance to individual reservations like those of the various Bands of the Minnesota Chippewa Tribe. The six component Bands of the Minnesota Chippewa Tribe occupy six separate reservations in Northern Minnesota. The land bases of all of these reservations were decimated in the late Nineteenth and early Twentieth centuries by a combination of allotments to individual Indians and sale of the of so-called "surplus" reservation land to non-Indians. Since the passage of the IRA in 1934, the constituent Bands of the MCT slowly have been recovering their lost reservation lands, but the task is far from over, and the loss of Section 5 of the IRA would be a serious setback.

Tribal lands are the foundation upon which tribal sovereignty and self-determination rest. If tribal lands are not held in the name of the United States pursuant to Section 5, tribal sovereignty would be weakened and the tribal self-determination would be threatened contrary to the longstanding policies of the Federal Government as expressed in the extensive body of law, regulation and policy directives that have been adopted since 1934. This body of legislative and executive policy favoring tribal sovereignty and self-determination is clear, consistent and coherent. To strike down Section 5 on the grounds that Congress has failed to fulfill its constitutional duty to provide reasonable guidance to the Secretary of the Interior ignores not only the express statutory guidance contained in the IRA as a whole and the general policy guidance contained in nearly all subsequent federal Indian legislation, but also the specific purposes behind Section 5 of the IRA as established by its legislative history and the administrative rules adopted by the Secretary of the Interior to implement it.

ARGUMENT

The six Bands of the Minnesota Chippewa Tribe occupy separate reservations scattered across Northern Minnesota. All of these reservations suffered the devastating effects of the "Allotment Era" of federal Indian policy. The allotment system came to Minnesota in the form of the so-called "Nelson Act" of 1889. Act of January 14, 1889, ch. 24, 25 Stat. 642. The Nelson Act, which was one of a number of "surplus land acts" that applied the General Allotment Act[3] to particular tribes, provided for the cession into trust of all of the lands of the Chippewas in Minnesota, except sufficient land to make allotments to individual Indians, and the conveyance of such "surplus lands" to non-Indians as "pine lands" or homesteads. By the time the Allotment Era came to an end in 1934 with the passage of the IRA, all but a tiny fraction of the over 1.7 million acres of land in the reservations of the bands that subsequently became part of the Minnesota Chippewa Tribe had been lost to timber companies, land speculators and homesteaders. *See* Chippewa Indians of Minnesota v. United States, 80 Ct. Cl. 410 (1935), *affirmed*, 301 U.S. 358 (1937); Minnesota Chippewa Tribe v. United States, 11 Cl. Ct. 221 (1986); 4 Folwell, A History of Minnesota, 219-96.

The IRA not only ended the Allotment Era and put federal Indian policy squarely behind tribal self-determination, it also gave Indian tribes a tool to begin to rebuild their land bases. *See* Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1, at 7-8 (1995). Section 5 of the IRA authorized the Secretary of the Interior to acquire land "for the purpose of providing land for Indians" and required land so acquired to be "taken in the name of the United States in

[3] Ch. 119, 24 Stat. 388.

trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. 465.

As Congress intended, this provision became, and remains today, the primary tool for restoring tribal lands lost during the Allotment Era. Federal trusteeship of tribal lands provides an important extra measure of insurance that these lands will never again be taken from the tribes or subjected to the hostile actions of state or local governments. No other available land acquisition method provides similar protection. The loss of Section 5 would be a serious blow to tribal land recovery efforts--efforts which are essential to maintaining the health, welfare and governmental authority of the Tribes themselves.

On the MCT reservations tens of thousands of acres of land have been taken into trust for the Tribe or its constituent bands pursuant to Section 5 over the past sixty-two years, but the task of rebuilding the tribal land base is far from done. Non-Indians, along with the state and federal governments, still hold the vast majority of the land in five of the six MCT reservations. Lands still need to be acquired for housing, economic development, natural resource and environmental management, construction of tribal facilities, protection of cultural and historical places and other public purposes.

In recent years, the six Bands of the Minnesota Chippewa Tribe have continued to rely on Section 5 to transfer land into trust. As various tribal enterprises have prospered, the Bands have allocated substantial portions of their earnings to land acquisition, and nearly all of the lands so acquired have been or are in the process of being placed in trust.

A brief review of the status of pending requests by the constituent bands of the MCT for trust acquisitions by the Secretary of the Interior illustrates not only the critical importance of Section 5 of the IRA but also the fact that the process is being used responsibly to acquire lands consistent with the purpose of the IRA as recognized by the Secretary of

the Interior in 25 CFR 151.3.[4] At present there are over 120 pending proposals for trust acquisitions for the MCT Bands. These range in size from one or two acres to several hundred, and total almost 7,000 acres. Nearly all are on a reservation, and all are for the kinds of public purposes contemplated by the drafters of the IRA. For example, the Leech Lake and Fond du Lac Bands each have 25 requests pending. All are to expand the reservation land base or to provide much-needed housing sites for Band members. Similarly, the White Earth Band has thirty-two requests pending, all of which are to expand the reservation land base and to provide housing sites, except for two parcels, both on the reservation, which are for gaming purposes. The reasons for the proposed trust acquisition of six parcels on the Bois Forte Reservation are to provide housing sites, to support economic development, and to site a sewage treatment plant. The approximately 20 pending requests by the Mille Lacs and Grand Portage Bands are for similar purposes.

Obviously, these kinds of proposals are well within the congressional purposes behind the IRA as summarized by the United States in its Petition for a Writ of Certiorari at 4-5, 16-17 and 21-22. The Court of Appeals was manifestly in error when it characterized Section 5 as lacking "perceptible 'boundaries'" and "'intelligible principles' that constrain this delegated authority." State of South Dakota; City of Oacoma v. United States Department of the Interior, 69 F.3d 878, 882,

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[4] 25 CFR 151.3, paragraph (a) provides that land may be acquired for a tribe in trust under the following circumstances:

> (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Appendix to Petition for Writ of Certiorari at 7a. The legislative history of the IRA, and its language as discussed by the United States in its Petition for Certiorari at 21-23, as well as subsequent legislation dealing with Indian affairs,[5]

[5] Since the passage of the IRA (with a brief period of backsliding in the 1950s), Congress and successive Presidents have built on this foundation a body of law and policy that supports tribal sovereignty and self-government. Prime examples include: President Johnson's Message to the Congress on Goals and Programs for the American Indians, Pub. Papers 335 (1968-69) (calling for a policy of "self-help, self-development, and self-determination for Indians"); President Nixon's Special Message to Congress on Indian Affairs, Pub. Papers 564 (1970) (proposing federal promotion of tribal self-determination, sovereignty and control over Indian country); President Reagan's Statement on Indian Policy, 1 Pub. Papers 96 (1983) ("Our policy is to reaffirm dealing with Indian tribes on government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination"); President Bush's Statement Reaffirming the Government-to-Government Relationships Between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc. 783 (June 14, 1991); Memorandum of President Clinton on Government-to-Government Relations with Native American Tribal Governments, 30 Weekly Comp. Pres. Doc. 936 (April 28, 1994) (reaffirming policy); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450a(b) (1983) (declaring Congressional "commitment to... the establishment of a meaningful Indian self-determination policy"); Indian Financing Act of 1974, 25 U.S.C. 1451 (1983) (promoting tribal responsibility "for the utilization and management of their own resources"); Indian Child Welfare Act of 1868, 25 U.S.C. 1901, *et seq.* (1983) (granting exclusive jurisdiction over Indian child custody to tribal courts); Tribal Self-Governance Demonstration Project Act of 1991, 25 U.S.C. 450f (1995) (amending the Indian Self Determination Act to provide devolution of federal program responsibilities and federal funding to several tribal governments); Clean Air Act Amendments of 1991, 42 U.S.C. 7602 (authorizing tribal governments to be treated as states for the purposes of adopting reservation air quality standards); and the Indian Tribal Justice Act, 25 U.S.C. 3601, 3602, 3611, 3612, 3613, 3614, 3621, 3631 (1995) (recognizing that one aspect of tribal sovereignty is the power to establish tribal courts). The Secretary's rules governing the transfer of land into trust under Section 5 of the IRA certainly consistent with the entire body of contemporary federal Indian law which in turn is based on the IRA.

leave no doubt about the purposes of Section 5 or any uncertainty that the rules of the Department of the Interior effectuate these purposes.

CONCLUSION

If it is allowed to stand, the decision of the Court of Appeals will do serious harm to the to the fundamental federal policies favoring tribal sovereignty and self-determination. The ability to transfer land into trust pursuant to Section 5 of the IRA is one of the most important means of effectuating these policies. For these reasons the Minnesota Chippewa Tribe urges the Court to grant the Government's Petition for Certiorari.

Dated: July 2, 1996.

Respectfully submitted,

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